



Access  
Partnership

# Public Procurement and Cloud Service Providers in the European Union



## Summary

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Cloud procurement across the European Union (EU) and its member states can present a number of challenges to cloud service providers who wish to operate in Europe.

The public procurement process in the EU is a complicated, multi-pronged, multi-institution process requiring bidding businesses to navigate several levels of rules and regulations. At the EU level, general procurement rules and regulations are bound by the [2014 Directive](#), which sets harmonised procedural rules for procurement practices across all EU member states.

While the EU does not set specific rules on cloud procurement, EU authorities have put in place guidance for procuring agencies to consider when seeking cloud services, particularly in the financial sector. At the national member-state level, cloud procurement is additionally affected by supplemental sets of national frameworks, regulations and guidance.

As experts in the field of regulatory policy, Access Partnership has the knowledge and expertise to help guide clients through this convoluted landscape of cloud procurement. Our public policy specialists have a thorough understanding of the regulatory environment across the EU and its member states, and possess extensive sector-specific knowledge, particularly in the fields of finance and health. These attributes allow us to provide our clients with comprehensive solutions to help achieve their goals with minimal fuss.

This report provides a snapshot of our capacity to deconstruct the complexities of EU procurement rules.

## Harmonised Procurement

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In 2014, the EU amended its procurement rules to update and harmonise the way that national governments, and the EU itself, procured goods and services from businesses. The rules put in place by [Directive 2014/24/EU](#) aimed to develop efficient channels for increased SME involvement, ensure best value for money in public purchases, and meet the EU's transparency and competition principles. The rules required that member states transpose the directive into national law by April 2016. Once transposed, member states would be able to procure goods and services from any business based within the EU through a centralised platform.

In October 2017, the European Commission [released an updated public procurement strategy](#), laying out six policy priorities. Two of the priorities aimed to ensure broader uptake of innovative, green and social procurement, as well as pushing the EU towards greater digital transformation. Referencing the Renewed Industrial Policy Strategy, the Commission believes a strategic procurement environment can boost competitiveness and build markets for smart and sustainable technologies. The ensuing procurement environment should favour cloud solutions that promote innovation, cost savings, efficiency, and sustainability.

## Conditions for Economic Operators

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All economic operators (EO), or suppliers, registered in the EU are able to participate in EU procurement procedures. Participation is also open to any EO from a non-EU country which has an agreement with the EU about public procurement market access. In order to qualify to tender, EOs must not fulfil a list of exclusion criteria.

When engaging in a tender, an EO may be asked to include a statement expressing acceptance of the technical specification and the model contract. The EO must also offer a declaration of honour, specifying that they are not guilty of doing any of the listed unprofessional or illegal behaviours that may exclude them from the procurement procedure. The EO must then provide documents providing proof of financial and professional capacity for the contract, alongside a technical proposal describing in detail how the EO intends to implement the contract, potentially including the method and schedule. Finally, depending on the tender requirements and procedure, the EO will provide its price breakdown. The Commission may require additional documents from any EO engaging in a tender proposal.

## EU Procurement Framework

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The EU does not have a dedicated platform specific to cloud services procurement. In the EU, procuring central government authorities' service contracts that exceed €144 000, and other, sub-central, public agencies' service contracts exceeding €221 000 must publish public tenders through the Official Journal of the EU (OJEU) and its electronic online-platform, the Tenders Electronic Daily (TED). If the value of the service contracts does not exceed the thresholds listed, then national rules apply, which nevertheless must respect general principles in EU law.

Once a buyer's tender is published, the procuring authority may only begin evaluating EO tenders after the deadline for submission has expired. The procuring authority is required to notify EOs whether or not

they have won the contract. If an EO is not selected, they are entitled to a detailed description of why the tender was rejected.

There are several procedures that dictate different timelines depending on the urgency, utilisation, and business participation. A procuring authority may choose to publish an information notice or publish the tender electronically, thus reducing the time limit for a supplier to submit a tender.

### **PICSE Model**

For cloud procurement, Procurement Innovation for Cloud Services in Europe (PICSE), a project funded by the European Commission and intended to develop simpler procurement models for cloud services, published [guidance for procuring authorities](#) which details methods for an effective request for cloud service contracts. PICSE's key message is that tenderers understand and be upfront about their requirements: "the goal is to draft contractual guidelines that enable tenderers to know the 'rules of the game' when they prepare their offers."

As per PICSE's model, buyers' tenders are expected to provide:

- Accurate specification needs, including technical legal and commercial requirements;
- A description of the the procurement evaluation process and criteria;
- Eligibility criteria for cloud service providers (CSPs) wishing to bid;
- Their approach to management of risks; and
- Budgetary limits.

Another recommendation is that procuring authorities use pre-procurement market consultations to benefit from transparency and market feedback, while encouraging a wider range of CSP bids, as well as utilising joint procurement methods to benefit from economies of scale, where combined capacity can improve purchasing conditions for participating authorities.

### **EU Official Types of Public Procurement Procedures**

Source: [europa.eu](http://europa.eu) "[Tendering rules and procedures](#)"

*Open procedure:* Any business may submit a tender. The minimum time limit for submission of tenders is 35 days from the publication date of the contract notice. The time limit can be reduced to 15 days if a prior information notice is published.

*Restricted procedure:* Only pre-selected businesses will be invited to submit a tender. The time limit to request participation is 37 days from publication of the contract notice. The public authority then selects at least 5 candidates with the required capabilities, who then have 40 days to submit a tender from the date when the invitation was sent. This time limit can be reduced to 36 days, if a prior information notice has been published.

*Negotiated procedure:* A public authority invites at least 3 suppliers with who it will negotiate terms of the contract. This procedure can only be used in a limited number of cases, for example for testing or research purposes. The time limit to receive requests to participate is 37 days from the publication of



the contract notice. This can be reduced to 15 days in extremely urgent cases, or 10 days if the notice is sent electronically.

*Competitive dialogue:* Often used for complex contracts where the public authority cannot define the technical specifications at the start. After the publication of the contract notice, interested businesses have 37 days to request participation. The public authority must invite at least 3 candidates to a dialogue in which the final technical, legal and economic aspects are defined. After this dialogue candidates submit their final tenders.

Process steps		Open	Restricted	Competitive	Negotiated
Specification	Publication of the advertisement	Y	Y	Y	Y
PQQ	Supplier completes a pre-qualification questionnaire	N	Y	Y	Y
Shortlist	Suppliers selected for shortlist on basis of PQQ	N	Y	Y	Y
Tender	Supplier responds to tender documents	Y	Y	Y	Y
Dialogue	Procurer enters into dialogue with shortlisted suppliers	N	N	Y	Y
Final tender	Supplier responded to revised invitation to tender	N	N	Y	N
Negotiation	Procurer negotiates terms of contract with (suppliers)	N	N	N	Y
Award	Procurer selected against criteria	Y	Y	Y	Y

## Regulatory Landscape for Cloud in Financial Services

In December 2017, the European Banking Authority (EBA) released a [report](#) providing guidance for financial services seeking to procure cloud services. The guidance provides a comprehensive set of considerations for financial sector entities when evaluating CSP offerings, including recommendations on contracting, right to physical access to business premises of CSPs, privacy issues, security frameworks, and several others. The guidance works hand-in-hand with the [2006 CEBS guidance](#) on outsourcing and comes into effect 1 July 2018.

## Regulatory Landscape for Cloud in the Healthcare Sector

The EU does not have a specific cloud procurement regulatory framework for the healthcare sector, nor does it provide guidance on the issue. Instead, the EU leaves regulatory action and policy-crafting to member states. The main piece of EU legislation relevant to healthcare sector cloud procurement practices is the [EU Data Protection Directive](#) (DPD), and now the [GDPR](#), which set out data protection, privacy, security and data location laws for the processing of health data.

## Impact of the GDPR

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The General Data Protection Regulation (GDPR) came into effect on 25 May 2018 and extended the EU data protection regime to all foreign companies processing the data of EU residents. The harmonisation of data protection regulations throughout the EU should, in theory, make it easier for non-European businesses to comply with the regulations; however, it will require strict data protection compliance. As of June 2018, there are 18 countries who are yet to implement the GDPR in national legislation, while a lawsuit against Google and Facebook has already been filed for their supposed failure to adhere to the new regulations.

## EU – Key Takeaways

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- Procurement is conducted at the EU level only if procuring central government authorities' service contracts exceed €144 000, and other, sub-central, public agencies' service contracts exceed €221 000.
- If thresholds are met, public tenders are published through the Official Journal of the EU (OJEU) and its electronic online-platform, the Tenders Electronic Daily (TED).
- The EU does not have cloud-specific procurement framework, thus requiring cloud service procurement to go through the same process as any other service.
- The EU's procurement goals aim to promote purchasing of innovative, green, and cost-effective goods and services. Cloud service providers (CSPs) can leverage the impact of their services, highlighting how their offerings check off each of the EU goals.
- The Procurement Innovation for Cloud Services in Europe (PICSE) has developed tender-drafting recommendations for agencies intending on procuring cloud services, hoping to educate agencies and ease potential pain-points when engaging cloud service providers.
- The European Banking Authority released [guidance](#) on cloud procurement within financial services, recommending financial institutions define their data protection, security, and privacy needs and requirements within service level agreements (SLAs) when outsourcing cloud services.
- The EU does not have a through-and-through cloud procurement regulatory framework, or guidance, for the healthcare sector.
- The [EU General Data Protection Regulation](#) (GDPR) came into effect on the 25 May 2018 and requires data processors to adjust their data protection, security, and privacy frameworks in order to comply with the new rules. There are 18 countries who are yet to implement national interpretations of the GDPR.